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IN THE

Supreme Court of the United States

October Term, 1951

No. 685 74

INDEPENDENT BROADCASTING COMPANY, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

Federal Communications Commission, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Independent Broadcasting Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on October 25, 1951, and modified on February 20, 1952, which judgment affirmed a decision of the Federal Communications Commission denying the applications of Independent Broadcasting Company for a license for Station WIBK, a standard broadcast station located at Knoxville, Tennessee, and for a construction

permit for a new frequency modulation station located also at Knoxville, Tennessee.

OPINIONS BELOW

The decision and order of the Federal Communications Commission (R. 226 *et seq.*) is reported in 4 Pike and Fisher Rules and Regulations 463 (1949). The original opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 279) is reported in 193 F. 2d 900 (U.S. App. D.C. 1951). The order denying the Petition for Rehearing and amending the original opinion (R. 307) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 25, 1951, (R. 282) and a Petition for Rehearing, filed on November 9, 1951, (R. 286) was denied on February 20, 1952. (R. 307) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. May the Commission, consistent with the First Amendment, deny an application for license because of the religious beliefs, speeches, writings and activities of a corporate officer and stockholder which occurred prior to the grant of any broadcast authorization.

2. May the Commission designate for hearing an application for license to cover a construction permit (FCC Form 302) upon general issues, exploratory in nature, and as a result of such a hearing accomplish the termination or revocation of the construction permit authorization, without first complying with the procedural requirements of Section 312(a) of the Communications Act.

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934, as amended, 48 STAT. 1064 (1934), 47 U.S.C. § 151 (1946), (hereinafter referred to as the "Act") are printed in the Appendix, *infra*, pp. 21-25.

STATEMENT

J. Harold Smith, an ordained Baptist minister (R. 233), is the president, a director, and a stockholder of Independent Broadcasting Company, (R. 232) hereinafter referred to as petitioner. On July 3, 1946, petitioner filed an application for a construction permit (FCC Form 301) for a new standard broadcast station (WIBK) to be located at Knoxville, Tennessee. (R. 10) This application was granted by the Commission on October 10, 1946. Thereafter, on July 8, 1947, petitioner, having completed construction of Station WIBK in accordance with the terms of the construction permit issued by the Commission, filed its application for license (FCC Form 302) and requested the Commission to authorize the commencement of operation. This authorization was granted by the Commission on July 11, 1947, in accordance with its Rules concerning program tests. (R. 227) Since that date Station WIBK has been in continuous commercial operation under periodic Commission authorizations.

On August 14, 1947, the Commission designated for hearing, upon general exploratory issues, petitioner's application for a license (FCC Form 302) for its standard broadcast Station WIBK. (R. 26) A hearing was held upon these issues and a final decision was issued on August 11, 1949, denying petitioner's application for license. (R. 226). In this decision the Commission found that Reverend Smith had made certain misrepresentations to the Commission in the various applications filed by peti-

tioner. (R. 260) The decision also considered the "Activities and General Reputation of J. Harold Smith" and made findings as to his religious activities, speeches and writings. Specific illustrations of his attacks on the Catholic Church, the Federal Council of Churches, and the Scripps-Howard interests were taken from (1) articles appearing in his newspaper "The Carolina Watchman," during the period 1941 to 1946; (R. 254) (2) paid advertisements in newspapers; (R. 255) (3) a pamphlet prepared by Reverend Smith; (R. 253) (4) a sermon appearing in "The Carolina Watchman" for April, 1941, and purportedly delivered over two unidentified radio stations; (R. 256) and (5) one sermon delivered over Station WIBK. (R. 253) In reaching the final conclusion of disqualification, the Commission specifically considered the religious activities of Reverend Smith prior to the filing of the original application and the decision was expressly based "upon the entire record in this case and particularly in view of the foregoing . . ." (R. 266) Petitioner filed a Petition for Reconsideration which was denied by a Memorandum Opinion and Order issued on June 2, 1950. (R. 270)

A Notice of Appeal was filed in the United States Court of Appeals for the District of Columbia Circuit on June 22, 1950. (R. 2) On October 25, 1951, the court affirmed the Commission's action. In its opinion, the court did not comment upon petitioner's contention that the use of the religious activities, speeches and writings of Reverend Smith, as a reason for the denial of the application for license, was a violation of the First Amendment. The court did find, however, that ". . . the Commission's order did not deprive the appellant of its AM construction permit which it had already exercised by constructing a broadcast station." The court also stated that Section 312(a) of the Act could have no application as ". . . it prescribes the procedure for revoking a station license, not a construction permit." (R. 281)

On October 31, 1951, the Federal Communications Commission filed a Petition for Amendment of Opinion and requested that the sentence, "Moreover, Section 312(a) of the Act could have no application as it prescribes the procedure for revoking a station license, not a construction permit" be deleted as it was unnecessary to sustain the conclusion of the court. The petition added that this statement was contrary to the current policy of the Commission which was to utilize the authority of Section 312(a) to revoke construction permits if no application for license had been filed. (R. 284)

On November 9, 1951, petitioner filed a Petition for Rehearing directed solely to the court's conclusion as to the inapplicability of Section 312(a) and opposing the Petition for Amendment of Opinion. (R. 286) On November 23, 1951, the Federal Communications Commission filed an Answer To Petition for Rehearing. (R. 299) The court, on February 20, 1952, denied the Petition for Rehearing, and granted the Petition for Amendment of Opinion by striking the requested sentence. In addition, the court added the following statements: (R. 307)

> "Section 312(a) has, therefore, no direct application to this case; this is not a revocation proceeding of any sort, but a proceeding on an application for a station license. For that reason we need not decide whether § 312(a) can in any circumstances be made applicable to a proceeding to revoke a construction permit."

SPECIFICATIONS OF ERROR TO BE URGED

The Court of Appeals erred:

1) In failing to hold that the denial of the application for license because of the religious beliefs, activities, speeches and writings of Reverend Smith is a violation of the First Amendment.

2) In holding that the construction permit expired upon the completion of construction of Station WIBK.

3) In failing to hold that the Commission should have proceeded under the revocation procedure of Section 312(a) of the Communications Act.

4) In affirming the order of the Federal Communications Commission.

REASONS FOR GRANTING THE WRIT

I. The Denial of the Application for License, Because of Writings, Speeches and Religious Activities of Reverend Smith, Is a Violation of the First Amendment.

1. This case represents the first real opportunity afforded the Supreme Court to pass on the applicability of the First Amendment to the licensing authority of the Federal Communications Commission. For the first time, the Commission has considered and given weight to religious beliefs, speeches, writings and activities which occurred prior to the time an application was filed, as a means of determining that an application for a license should not be granted. The Commission's action is of greater interest and importance because it flies in the face of the principle announced in recent cases of this Court. There appears to be no doubt that the denial of a license to a minister to address a public assembly because of his religious beliefs and prior speeches would be a violation of the First Amendment. *Kunz* v. *People of New York*, 340 U.S. 290, 71 S. Ct. 312 (1951); *Niemotko* v. *State of Maryland*, 340 U.S. 268, 71 S. Ct. 325 (1951). Yet, in effect, the Commission has done just that in the instant case, and has attempted to justify its action on the ground that the First Amendment does not apply to the licensing authority granted it by the Communications

Act. The lower court accepted the Commission's elevation of the Communications Act over the First Amendment without discussion or citation of authority. It is submitted that such an assumption of power by an administrative agency should never be accepted until exhaustively examined and specifically approved by the highest court of the land.

The Commission in its decision made extensive findings on the writings and religious activities of J. Harold Smith. To clarify the actual significance of this action, certain facts should be emphasized. (1) There is no dispute that Reverend Smith is a bona fide ordained Baptist minister (R. 233) or that he is entirely occupied in religious activities; (2) only one speech was found to have been made over the facilities of Station WIBK (R. 253) and two others were alleged to have been made over unnamed stations with which Reverend Smith had no connection; (R. 256) (3) all of the other speeches and activities referred to were made from the pulpit, in his church paper, or from other non-broadcast forums, prior to the filing of the instant applications; and (4) the Commission concedes that these actions were not lewd, obscene or unlawful in any way. (R. 265, 274)

2. It is submitted that this action of the Commission violates the First Amendment in that it is, in effect, a law ". . . prohibiting the free exercise of religion, abridging the freedom of speech, or of the press . . ." While the most common form of a violation of the freedom of speech is prior censorship, it appears immaterial whether the Court considers the Commission's action prior censorship or subsequent punishment. Apparently, the Commission is denying petitioner a license in order to prevent a repetition of Reverend Smith's activities over Station WIBK, since the decision specifically states that it considered these actions in an attempt ". . . to anticipate his behavior as a licensee . . ." (R. 265) However, it is not

prior censorship alone that violates this Amendment. This Court has held that ". . . freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment . . ." *Terminiello* v. *City of Chicago,* 337 U.S. 1, 4, 69 S. Ct. 894, 896 (1949), and that ". . . Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes." *American Communications Ass'n, CIO* v. *Douds,* 339 U.S. 382, 402, 70 S. Ct. 674, 686 (1950), *rehearing denied,* 339 U.S. 990, 70 S. Ct. 1017 (1950). It is submitted, therefore, that, whether the Commission's actions be considered censorship of future speeches or punishment, harrassment or discouragement for past statements and religious activities, it is fundamentally a violation of the protection afforded by the First Amendment.

3. This Court has said that the broadcasting field is open to anyone, providing there is a frequency available, and the person shows his competency, the adequacy of his equipment and his financial resources. *Federal Communications Commission* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 475, 60 S. Ct. 693, 697 (1940). Therefore, petitioner was deprived of a right to apply and be granted a radio station license, when the Federal Communications Commission determined that Reverend Smith was not qualified to be a licensee by reason of his speeches, publications, and religious activities engaged in prior to the filing of the application. Manifestly, the Commission found that, because it did not approve of what Reverend Smith said, his character necessarily was bad; presumably, had it approved of what he said, it would have considered this as evidence that his character was good. In other words, persons who may some day desire to be licensees of radio stations must now talk, write, and act in an approved manner, otherwise they may be precluded at some future date from receiving a broadcast

license. The Commission's theory is in reality a device by which it is able to punish Reverend Smith for his speeches, even though it is expressly forbidden by Congress to censor the program content of radio programs.[1] Moreover, it was apparently the intention of Congress that the Commission should have no power to consider what one says in connection with "a license or the revocation of a license."[2] In effect, the Commission has done just what this Court held is prohibited when it said that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion . . ." *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 642, 63 S. Ct. 1178, 1187 (1943).[3]

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[1] Section 326 of the Act provides: "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

[2] *See,* for example, the following discussion between Congressman LaGuardia and Congressman White, Floor manager, on H. R. 9971, which became the Radio Act of 1927:

"Mr. LaGuardia: The gentleman stated the recommendations, among which was a guaranty of free speech over the radio. What provision does the bill make to carry that out?

"Mr. White of Maine: It does not touch that matter specifically. Personally, I felt that we could go no further than the Federal Constitution goes in that respect. *The pending bill gives the Secretary no power of interfering with freedom of speech in any degree.*

"Mr. LaGuardia: *It is the belief of the gentleman and the intent of Congress in passing this bill not to give the Secretary any power whatever in that respect in considering a license or the revocation of a license.*

"Mr. White of Maine: No power at all." (Italics Supplied) 67 CONG. REC. 5480 (1926)

[3] The cases relied upon by the Commission in its brief in the lower court are not in point. In *Trinity Methodist Church, South* v. *Federal Radio Commission,* 61 App. D.C. 311, 62 F. 2d 850 (1932), *cert. denied,* 284 U.S. 685, 52 S. Ct. 204 (1932), the Commission denied an application for renewal of license because of re-

4. In this case, the Commission deliberately chose to make its decision dependent upon an affirmative finding on all of the issues involved. It did not conclude that any one of the enumerated findings, or any part of them, is sufficient to support the denial. It is submitted, therefore, that, if the First Amendment prohibits the Commission from denying the application because of Reverend Smith's speeches, writings and religious activities, the decision must be reversed. It is clearly a question of policy, entrusted solely to the Commission, whether one of the findings or any part of them is a sufficient basis for a denial. *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U.S. 80, 88, 63 S. Ct. 454, 459 (1943); *Pottsville Broadcasting Co.* v. *Federal Communications Commission*, 69 App. D. C. 7, 10, 98 F. 2d 288, 291 (1938), *subsequent case, same parties, reversed*, 309 U.S. 134, 60 S. Ct. 437 (1940).

5. It may be that the majority of the American public would not approve of the statements of Reverend Smith, nor condone his attacks on established institutions. Yet, the fact that he is a religious dissenter whose views may be "unpopular, annoying or distasteful" does not deprive him of his constitutional rights. *Murdock* v. *Common-*

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ligious statements made by the licensee over the facilities of his own station. No issue was raised as to speeches made off the air prior to the time the station was licensed. In *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 227, 63 S. Ct. 997, 1014 (1943), the sole issue was whether the Commission could make special regulations applicable to stations engaged in chain broadcasting. While the issue of the applicability of the First Amendment was raised, there is no similarity to the present facts. The Court there stated that the First Amendment does not include the right to use the radio without a license. There was no question of a denial of license because of past religious activities outside of radio. In *Mansfield Journal Co.* v. *Federal Communications Commission*, 86 U.S. App. D.C. 102, 180 F. 2d 28 (1950), the outside activities of the applicants were not protected by any Constitutional provision but were illegal in themselves. None of these cases, therefore, are authority for the Commission's action.

wealth of Pennsylvania, 319 U.S. 105, 116, 63 S. Ct. 870, 876 (1943). The Commission may be convinced that the listening public should be protected from the danger of such statements being made on the radio. But the First Amendment was designed to prevent the Government from taking upon itself just such a power. Congress stayed well within this limitation when it included in the criminal code a provision making the use of obscene and lewd language in a radio broadcast a criminal offense.[4] In addition, the courts have recognized the existence of such remedies as libel, slander, and criminal actions for breach of the peace that may be used to discourage and punish the speaker who exceeds the permissible limits. Nor was the Commission's action, whatever it may be called, justified or supported by any finding that the speeches would cause an immediate danger, violate any law, or cause any other result that the Government is authorized to prevent. Rather, it is solely the conclusion of the Commission that the conventional and permissible safeguards are inappropriate and that, since it does not approve of Reverend Smith's language, it will prevent the possibility of such being broadcast in the future.

The significance of this decision could easily be overlooked because of the nature of the language used and the presence of other findings which, in themselves, may have justified a denial without a consideration of Reverend Smith's speeches and religious activities. But by the inclusion of the latter findings, and by basing the conclusion of disqualification upon *all* of the findings, the Commission has created a new and unprecedented power for itself. This case stands as authority for the principle that religious beliefs, speeches, and writings may be grounds for the denial of an application for license because they are evidence that the applicant does not have an approved character. Under such a theory, newspapers might

[4] 62 STAT. 769 (1948), 18 U.S.C. § 1464 (Supp. III, 1950).

lose the privilege of second-class rates because they do not hold approved economic or political views. See *Hannegan* v. *Esquire*, 327 U.S. 146, 156, 66 S. Ct. 456, 461 (1946). Orthodoxy will become the theme of all who wish radio licenses and the persons having minority views will either conform to accepted mores or lose their right to be licensees and perhaps even the right to broadcast over radio facilities.[5] If the precedent is once established that a man's writings, speeches, and religious activities may be the basis of an adverse character finding because these activities do not meet the self-promulgated standards of a particular government agency, no one will be free to criticize or attack the accepted, but perhaps erroneous, beliefs of the times. It is submitted that the basis of the Constitutional protection of the First Amendment is that the public good will best be served by permitting the public to choose among the various religious ideas, principles, and beliefs that the citizens may hold. If the Commission may deny an application for a license because of a person's speeches and writings, this freedom of choice will rest in the Government and not in the people. See *Cantwell* v. *State of Connecticut*, 310 U.S. 296, 310, 60 S. Ct. 900, 906 (1940).

II. Petitioner Is Entitled to the Procedural Protection of Section 312(a) of the Communications Act.

6. The effect of the decision below is to create a new class or category in the broadcast field, which is neither applicant nor licensee, and thereby to deny that class or category the procedural protection of Section 312(a) of

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[5] While this case deals only with the right to be a licensee, it is submitted that the denial is premised on the fact that, as a licensee, Reverend Smith would either make or allow such speeches to be made on Station WIBK. Obviously, then it is the broadcast, itself, which the Commission intends to prevent. Other licensees will, accordingly, feel that their character will be tainted if "unapproved" religious tenants are voiced over the radio.

the Communications Act, contrary to the intent of Congress. This is the first judicial pronouncement on the inapplicability of Section 312(a) of the Communications Act to persons who, prior to this decision, were considered by the Commission and the Bar to be holders of construction permits.

7. The finding that a construction permit expires upon completion of construction of a broadcast facility is completely new to Commission practice and was not mentioned by either party in their briefs before the lower court. The court cites neither legislative history nor statutory authority to support this novel and far-reaching concept. While in this case, the finding is but a technical distinction that is of importance only in so far as it is made the basis for the court's conclusion that the petitioner is not entitled to the procedural protection of Section 312(a) of the Act, the far-reaching and important effect on Commission procedure cannot be ignored. The conflict involved in the lower court's decision may be summarized as follows: (1) Both petitioner and the Commission agree that the words "station license" in Section 312(a) of the Act are sufficiently broad to include a construction permit. The court at first disagreed with both parties, concluding that the section referred only to the formal license. Subsequently, however, it decided that it need not pass on this point. (2) The lower court and the Commission agree, but apparently for different reasons, that once a formal application for license (FCC Form 302) is filed, the provisions of Section 312(a) no longer apply to the holder of a construction permit. As a result, the Commission may now continue its current practice of interpreting Section 312(a) as requiring that it must revoke a construction permit that has been granted, unless an application for license (FCC Form 302) has been filed. Once this application has been filed, the Commission insists that it no longer need resort to the revocation procedure, but may proceed with a general investi-

gatory hearing authorized by Section 309(a). The court below, in granting the Commission's Petition for Amendment of Opinion, has refused to pass on the legality of the Commission's procedure, despite its original statement that Section 312(a) does not apply to a construction permit. Petitioner, on the other hand, has contended that the revocation provisions of Section 312(a) apply, not only to the holder of a construction permit who has not filed an application for license, but to all persons who hold any Commission authorization which has not expired or been forfeited. It is submitted that the Commission's contention and practice are both inequitable and erroneous in that it holds that a person can once gain the procedural protection of Section 312(a) and subsequently lose it through no fault of his own. Such a practice should not be allowed to continue unless it is clearly in accord with Congressional intent.

8. There appears to be ample authority to justify petitioner's and the Commission's contention that the Congress intended that the opening phrase of Section 312(a) —"Any station license may be revoked . . ."—would extend the revocation protection to holders of construction permits. The Act, itself, does not define the word "license" so it seems logical that it should be read in the light of the subsequent Congressional definition in Section 2(e) of the Administrative Procedure Act.[6] Congress stated therein that a license ". . . includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." This Court has apparently already adopted the same view with reference to the identical phrase in Section 309(a). It noticed the fact that Section 319 is silent as to the procedure to be followed by the Commission in considering applications for construction permits and that Section 309(a) provides only for appli-

[6] 60 STAT. 237, 5 U.S.C. § 1001(e) (1946).

cations for "station licenses." The conclusion reached was that, since applications for "construction permits" are in substance applications for "station licenses," the procedure set up by Congress in Section 309(a) to apply to an application for a "station license" should be followed. *Ashbacker Radio Corporation* v. *Federal Communications Commission,* 326 U.S. 327, 66 S. Ct. 148 (1945), footnote 1.

9. Assuming, therefore, that the view shared by petitioner and the Commission is correct, the further problem remains as to how the protection once granted to a holder of a construction permit may be lost. The Commission's answer, as petitioner understands it, disregards this problem and contends that this is not a revocation proceeding but the consideration of an application for a new authorization which the Commission may consider *de novo* under the authority of Section 309(a). As shown, hereinafter, the Commission ignores the conflict between its prior practice and the court's statement relative to the life of the construction permit; it ignores the fact that Section 319(b) provides that a construction permit shall "be forfeited" and will not "expire," unless completed within the time specified therein; and it ignores the fact that nowhere in the Act is there any provision that determines when a construction permit expires. The significant weakness of the Commission's contention is that the Act neither requires nor describes the formal application for license, (FCC Form 302) and Section 319(b) is silent as to the procedure that may be used if the Commission determines that the issuance of a license is *against the public interest.* The Commission, by inserting a new procedural step, purportedly only for administrative convenience, has changed the protection Congress intended to be given to all holders of any sort of Commission authorization. It has also circumvented the Congressional prohibition in Section 405 of the Act that twenty days after a construction permit is granted, it is no longer subject to attack under the broad investigative provisions of Section 309(a). The

court below has sanctioned this procedure by its decision. Therefore, it now appears that all administrative agencies may deny a licensee the protection of a statutory revocation provision by merely creating a series of applications and holding that the filing of a new administrative application will automatically revert the holder to his original status as an applicant without any procedural rights, even though he may have incurred a substantial financial outlay in the belief that certain rights have accrued to him as a licensee.

A further defect in the theory of the Commission is shown by the very fact that when Congress did intend to limit the applicability of Section 312(a), it clearly spelled out this limitation in the Act itself. A specific provision in Section 307(d) eliminates applications for renewal of license from this protection. Section 307(d) provides that applications for the renewal of a license ". . . shall be limited to and governed by the same considerations and practice which affect the granting of original applications." In addition, the section also provides that no license for the operation of a broadcast station shall exceed three years. Congress, therefore, has excluded this type of application by (1) expressly limiting the life of the "license," and (2) providing that a general investigatory hearing procedure must be used. In contrast, the Act is silent as to the time a construction permit *expires*, or what hearing procedure shall be used to determine if a grant of a license would be against the public interest. It is obvious, therefore, that Congress deliberately used the words "against the public interest" in Section 319(b) because of its intent that the revocation procedure was applicable.

10. The lower court, however, chose to exclude the petitioner from the protection of Section 312(a) for a different reason. It found that a construction permit expires upon completion of construction and that therefore

nothing remains which is subject to revocation. It also chose to ignore the fact that, since petitioner was in fact an operating broadcast station, an authorization of some sort must exist. The Commission, on the other hand, has apparently always considered that a construction permit continued in existence after completion of construction until such time as the formal license is issued. In a decision issued on December 4, 1950, the Commission stated:

> "It has long been the recognized practice of this Commission that the filing of an application for license continues the effectiveness of a construction permit, and makes unnecessary the filing of requests for extensions of construction permit during the pendency of an application for license. *Falls County Public Service*, 6 R. R. 273, 281 (1950)."

The Commission has recognized that, after the station is built and on the air, and prior to the grant of the license, a construction permit may be assigned as an existing and effective authorization. For example, Station KFTM, Fort Morgan, Colorado, filed an application for a license and began program tests in May, 1949. On June 8, 1949, before a license was issued, an application for assignment of construction permit was granted. While the application for assignment was filed prior to the completion of construction, it was granted subsequent thereto. See statement of facts In re *Revocation of License of Station KFTM*, 6 R. R. 1224, 1225 (1951). In addition, the Commission's Rules, in effect at the time the Commission's final decision was issued, tacitly recognized that the life of the construction permit continued after the completion of construction. Section 1.316 of the Commission's Rules provided in part as follows:[7]

> "(a) When construction and equipment tests are completed in exact accordance with the terms of the

[7] Section deleted effective December 11, 1950, and wording changed in Section 3.168 which now covers this subject.

construction permit, the technical provisions of the application therefore, and the rules and regulations governing the class of station concerned, and after an application for station license has been filed with the Commission showing the transmitter to be in satisfactory operating condition, *the permittee* is authorized to conduct service or program tests *in exact accordance with the terms of the construction permit* for a period not to exceed 30 days.

• • • •

"(d) The authorization for tests embodied in §§ 1.315 and 1.316 *shall not be construed as constituting a license to operate but as a necessary part of the construction.*" (Italics Supplied)

The lower court's conclusion, limiting the life of a construction permit, will have a serious effect upon the practical administrative procedure of the Commission. Obviously, the transfer of a construction permit after construction is completed will no longer be possible. In addition, the Commission will have to discontinue its present procedure of allowing an amendment to a construction permit, after the application for license has been filed, in order to modify its original authorization. Moreover, a serious question arises as to the legal status of a person who completes construction but does not immediately receive program test authorization. Does he have any sort of "license" during this period? Must he be treated as a new applicant if a competing application is filed?

11. The erroneous nature of the lower court's conclusion as to inapplicability of the revocation procedure authorized by Section 312(a) is further evidenced by the language of Section 308(b):

"The Commission, at any time after the filing of such original application and during the term of any such license, may require from *an applicant or licensee* further written statements of fact to enable it to determine *whether such original application should*

be granted or denied or such license revoked." (Italics Supplied)

This section refers only to two classes of persons, i.e., an applicant or a licensee. If the former is involved, a general investigatory hearing under the authority of Section 309(a) may be used. If a licensee is involved, then the revocation proceeding of Section 312(a) must be employed. Thus, it appears that Congress contemplated that the Act would create only two legal categories of persons before the Federal Communications Commission. This intent was ignored by the lower court in its decision. It has created a third and new category of persons and arbitrarily placed it in the same legal position as an applicant.

12. The Commission's denial to petitioner of the procedural protection of Section 312(a) was a deprivation of a substantial right. The general issues did not give petitioner notice of the specific violations with which it was charged. Petitioner had to assume the burden of proof when it should have been placed upon the Commission. But the significance of the decision to petitioner is secondary to its effect on Commission administrative procedure. The decision allows the Commission to continue its practice of considering permittees, who have completed construction of a broadcast facility and filed an application for license, as new applicants without any procedural rights. It sanctions a different treatment for the permittee who has not constructed his station than that for the permittee who, at considerable expense, has completed construction, when in fact there is no basis in the Communications Act or judicial decisions for such a distinction. If Congress intended to give a limited property right to anyone, it was to the person who had expended large sums of money in reliance on the protection accompanying a grant and who, as yet, had had no opportunity to recoup any part of that investment. More im-

portant, the decision below is an unprecedented sanction of an administrative assumption of authority. While the Act authorizes the Commission to require additional applications, nothing therein gives it the right to change the legal status of a "licensee" by the creation of these administrative applications. Yet that is the present practice of the Federal Communications Commission. Such a statutory interpretation with its manifest ramifications should not be allowed to stand without an examination by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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May, 1952

APPENDIX

COMMUNICATIONS ACT OF 1934, AS AMENDED, 48 STAT. 1064 (1934), 47 U.S.C. 151 (1946).

Section 307(d):

No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

Section 308(b):

All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such

application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

Section 309(a):

If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

Section 312(a):

Any station license may be revoked for false statements either in the application or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act or by a treaty ratified by the United States: *Provided, however,* That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of

said hearing the Commission may affirm, modify, or revoke said order of revocation.

Section 319(a):

No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

Section 319(b):

Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee. The rights under any such permit shall not be assigned or otherwise transferred to any person without

the approval of the Commission. A permit for construction shall not be required for Government stations, amateur stations, or stations upon mobile vessels, railroad rolling stock, or aircraft. Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit.

Section 405:

After a decision, order, or requirement has been made by the Commission in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear: *Provided, however*, That in the case of a decision, order, or requirement made under title III, the time within which application for rehearing may be made shall be limited to twenty days after the effective date thereof, and such application may be made by any party or any person aggrieved or whose interests are adversely affected thereby. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is

granted, the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination, shall be subject to the same provisions as an original order.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 74

INDEPENDENT BROADCASTING COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The decision of the Federal Communications Commission (R. 226-269) [1] has not been reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 279-281) is reported at 193 F. 2d 900. The order denying the petition for rehearing and amending the original opinion (R. 307) has not been reported.

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[1] In this brief, references to the printed record appear as R. ——, and references to the original administrative record appear as Tr. ——.

JURISDICTION

The judgment of the Court of Appeals was entered on October 25, 1951 (R. 282). A petition for rehearing filed on November 9, 1951 (R. 286-298), was denied on February 20, 1952 (R. 307). The petition for a writ of certiorari was filed on May 20, 1952. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Commission may, consistently with the First Amendment, deny an application for a radio station license where evidence as to the past pattern of behavior of the principal stockholder, in the form of speeches, writings, and other activities, supports findings from which the Commission could reasonably conclude that the applicant lacked the character and sense of responsibility necessary to operate a radio station in the public interest.

2. Whether the Commission upon first learning of causes or circumstances which would make the operation of the station against the public interest, after the grant of a construction permit, acted properly under Sections 319(b) and 309(a) of the Communications Act in passing on the qualifications of the parties involved in a hearing on its application for station license.

STATUTES INVOLVED

The pertinent sections of the Communications Act of 1934 are set out in the appendix to the petition for certiorari.

STATEMENT

On July 3, 1946, petitioner Independent Broadcasting Company applied to the Commission for a permit to construct a new standard AM broadcast station in Knoxville, Tennessee (R. 10). Section 319 of the Communications Act of 1934, as amended, provides that no station license may be granted for operation of any station unless a permit for the construction has been previously granted by the Commission. The construction permit was granted on October 10, 1946 (Tr. 111). On July 8, 1947, after completion of the construction, petitioner filed an application for station license (Tr. 308). Meanwhile, on December 16, 1946, petitioner had also filed an application for a permit to construct an FM station at Knoxville (R. 23).

Subsequent to the grant of the AM construction permit and prior to the filing of application for license on July 8, 1947, information came to the attention of the Commission, as the result of an investigation in connection with petitioner's FM application, which indicated that Independent, or its officers and stockholders, had engaged in misrepresentations and concealments in various applications, amendments and reports filed with the Commission and that the activities of J. Harold Smith, its president and principal stockholder, demonstrated his unfitness to control a broadcast licensee. On the basis of this information, the Commission on August 14, 1947 (R. 26), set for hearing, in a consolidated proceeding, the application for an AM station license and the application

for an FM construction permit. The hearing was held in Washington, D. C. from October 20 through October 24, 1947, and in Knoxville, Tennessee from November 17 through November 19, 1947. An Initial Decision, concluding that the applications should be denied, was issued on June 29, 1948 (Tr. 2174-2201). On August 13, 1948 petitioner filed exceptions (Tr. 2213) and oral argument was held on December 7, 1948 (Tr. 2285). On August 11, 1949 the Commission rendered its final decision denying both applications (R. 226-266).

On the basis of the evidence presented at the hearing, the Commission made findings of fact from which it concluded that petitioner had concealed or misrepresented facts of such materiality as to warrant denial of its applications. The Commission found that petitioner had misrepresented the true facts with respect to the distribution of a large percentage of both the common and preferred stock of the corporation. Smith, his wife, and a third stockholder each held 50 shares of common stock at the time of filing the application for a construction permit, and it was represented to the Commission that the third party would receive the remaining 50 shares. Instead, these remaining shares were split three ways with the result that Smith and his wife received a controlling interest. While it had been represented that the preferred stock would be sold on the open market, it was, in fact, all sold to Smith. The true financial status and the business and radio activities of Smith had also been misrepresented. There was no disclosure

of Smith's interest in the Southern Bible Institute, a newspaper called "Carolina Watchman," a program called the "Radio Bible Hour," nor in XERF, a Mexican radio station. The true amount of Smith's assets was misrepresented and his liabilities were listed as "none" when, in fact, he owed $123,000.

The Commission also made an independent determination that it was unable to conclude that Smith, petitioner's president and controlling stockholder, should be entrusted with the responsibilities of a licensee. This conclusion was based upon consideration of undisputed evidence concerning the intemperance of the language used by Smith in his writings and broadcasts, his constant habit of attacking the honesty and sincerity of those with whom he disagreed, his efforts to institute economic boycotts of people and groups who failed to give him the degree of cooperation which he demanded, and his solicitation of funds on the basis of statements of urgent need contrary to fact.

On appeal the Court of Appeals for the District of Columbia Circuit affirmed the decision of the Commission with respect to all points raised. Speaking for the court, Judge Miller stated that the Commission had made findings in considerable detail and that (R. 280):

> . . . the record fully justifies and solidly supports the findings. The evidence left no doubt as to misrepresentation and concealment of pertinent factual information. It contained information showing not only that Smith had

> been intemperate in his writings, sermons and broadcasts, but that he was an expert in vituperation and vilification.

Despite the fact that the petitioner had at no time raised before the Commission any question concerning the legality of the procedure followed by the Commission in ordering a hearing on petitioner's application for station license, the argument had been made before the Court of Appeals for the first time that the proper procedure should have been revocation of its construction permit pursuant to the provisions of Section 312(a) of the Act. The court rejected this argument (R. 281):

> The issuance of a construction permit does not guarantee a station license to the permittee, who is warned by § 319(b) of the statute that he will not be entitled to an operating license after completion of construction unless he has fully met all the terms, conditions and obligations of his application and permit, and unless it is made to appear to the Commission ". . . that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest . . ."

On February 20, 1952, the court denied a petition for rehearing (R. 307).

ARGUMENT

1. This case involves a decision of the Commission, made after a full hearing, denying an appli-

cant a standard broadcast station license and a permit to construct an FM station. These applications were denied because the Commission found the applicant did not possess the requisite character qualifications essential to a determination that the applicant could be entrusted with the public responsibility of a broadcast licensee. This conclusion was based upon two independent grounds, either of which fully warranted the denial of the applications. (R. 260.) The first of these, with which petitioner does not here take issue, was that the applicant had concealed or misrepresented facts in various applications and pleadings filed with the Commission and consequently was not qualified to be a licensee. The Commission is authorized to deny an application for a license where it finds that the applicant, in its dealings with the Commission, has made false statements or otherwise misrepresented facts to the Commission, or has failed to submit other information which it was under an obligation to provide. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223; *Federal Communications Commission* v. *Broadcasting Service Organization, Inc.*, 337 U.S. 901; *Mester* v. *United States*, 70 F. Supp. 118 (E.D. N.Y.), affirmed, 332 U. S. 749. The factual basis for this determination was reviewed by the Court of Appeals, and the evidence and the findings were found fully adequate to warrant the Commission's decision. The Commission's decision can rest on the above ground alone and it is, therefore, unnecessary to reach the other independent basis upon

which the Commission placed its decision. See *Alma Motor Co.* v. *Timken Co.*, 329 U.S. 129; cf. *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62; *LeTulle* v. *Scofield*, 308 U.S. 415.

2. It is, in any event, clear that the Commission's alternative ground for denying petitioner's license application because the record of the activities of its president and controlling stockholder demonstrated his lack of qualifications to meet and bear the responsibilities of a broadcast licensee, does not raise any serious constitutional issues. The Commission's decision was not one denying Smith the use of broadcasting facilities for broadcasting any of his views nor denying Smith a license to own and operate radio facilities because of disagreement with his views. Rather, it denied petitioner a license to own and operate broadcast facilities because the record conclusively demonstrated that Smith's past conduct was of a nature strongly indicating to the Commission that a corporation dominated by him could not be entrusted to discharge important responsibilities of a broadcast licensee to operate in the public interest. As the Commission stated in its decision (R. 265):

> Our concern in this proceeding is not with the propriety of individual broadcasts containing the language which Smith has used and the attacks which he has made, but with Smith's qualifications as a broadcast licensee, in which role he will have the responsibility of determining the overall radio fare offered to the listeners in the service area of his station.

It is a basic principle of the Communications Act that the day-to-day determinations as to what individuals should be given access to the radio and what subjects or issues should be discussed must be made by the individual licensees in the exercise of their responsibilities to operate their stations in the public interest. Cf. *Simmons* v. *Federal Communications Commission,* 169 F. 2d 670 (C.A.D.C.), certiorari denied, 335 U.S. 846. Moreover, far from indicating that persons with the religious and other views of Smith should be excluded from the air, the Commission has always held that licensees should, as far as possible, present a balanced well-rounded program schedule including differing viewpoints on religious and social problems (see *In the Matter of Editorializing by Broadcast Licensees,* 1 (Part 2) Pike & Fischer, R.R. p. 91:201; *United Broadcasting Company (WHKC),* 10 F.C.C. 515; *Petition of Sam Morris,* 11 F.C.C. 197), and that stations may not justify a policy of excluding the expression of any significant point of view on religious or secular matters on grounds that its expression might prove unpopular with a segment or even a majority of the listening public. *Petition of Robert Harold Scott,* 11 F.C.C. 372.

Sections 308(b) and 319(a) of the Communications Act expressly provide that in determining the qualifications of a licensee to serve the public interest, the Commission should consider the

"character" of applicants to the extent it may bear on his ability to operate a station in the public interest. See *Mester* v. *United States*, 70 F. Supp. 118 (E.D.N.Y.), affirmed, 332 U.S. 749. And, "in determining whether a particular applicant should be permitted to operate so important and restricted a facility as a radio station, which reaches into the homes of so many people, it is appropriate that the Commission examine pertinent aspects of the past history of the applicant." *Mansfield Journal Co.* v. *Federal Communications Commission*, 180 F. 2d 28, 33 (C.A.D.C.). The test is an applicant's ability to serve the "public interest," and denial of an application on that ground, if valid under the Act, is not an abridgement of the rights guaranteed by the First Amendment. *National Broadcasting Company* v. *United States*, 319 U.S. 190, 227; see *Mansfield Journal Company* v. *Federal Communications Commission*, 180 F. 2d 28 (C.A.D.C.); *Johnston Broadcasting Company* v. *Federal Communications Commission*, 175 F. 2d 351 (C.A.D.C.); *Simmons* v. *Federal Communications Commission*, 169 F. 2d 670 (C.A.D.C.), certiorari denied, 335 U.S. 846; *Bay State Beacon, Inc.* v. *Federal Communications Commission*, 171 F. 2d 826 (C.A.D.C.); cf. *Trinity Methodist Church, South* v. *Federal Radio Commission*, 62 F. 2d 850 (C.A.D.C.), certiorari denied, 284 U.S. 685, and *KFKB Broadcasting Association* v. *Federal Radio Commission*, 47 F. 2d 670 (C.A.D.C.).

3. Petitioner's contention that the Commission

acted improperly in passing upon its application for a station license pursuant to the provisions of Sections 309 and 319(b) of the Communications Act rather than proceeding by way of revocation of its outstanding construction permit, in accordance with the provisions of Section 312(a) of the Act, clearly presents no substantial question.

In accordance with Section 319(b) the Commission, where the holder of a construction permit has completed construction and desires to secure a station license for regular operation, requires the permittee to file an application for such a license. And where it appears either that the terms, conditions or obligations set forth in the original application for a permit or the permit itself have not been met or, as here, that circumstances which have first come to the Commission's attention since the grant of the permit would make operation of the station against the public interest, the application for station license is designated for hearing in conformity with the provisions of Section 309(a) of the Communications Act. This section provides:

> If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such

> application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

Petitioner made no objection to following this established procedure throughout the entire course of proceedings before the Commission. It contended in the Court of Appeals, for the first time, that the proper procedure in this case was to be found in Section 312(a) of the Act, relating to "Revocation of Licenses." Its argument, in brief, is that when the Commission discovered, after the construction permit had been granted and construction of the station completed, that the permittee had made misstatements of fact to the Commission and had otherwise demonstrated that its operation of a station would be contrary to the public interest, the Commission's sole remedy was to revoke the construction permit rather than to hold a hearing in the prescribed manner on the station license application. The Court of Appeals properly rejected this argument, holding that Section 312(a) has "no direct application to this case; this is not a revocation proceeding of any sort, but a proceeding on an application for a station license." (R. 281.)

Nor is there any merit in petitioner's contention that confirmation of the statutory procedure followed in the instant case would result in the crea-

tion of a period in which the holder of a construction permit who has applied for a station license is neither a permittee nor licensee and consequently reverts to the same status and rights of an original applicant who has not yet secured a construction permit. Neither the Court of Appeals nor the Commission has suggested that petitioner ceased to be a permittee either when it completed construction or filed its application for a station license; obviously it continued to be the holder of a valid permit until the Commission completed its determination of its license application. And as such its license application was required to be considered according to the express standards of Section 319 (b); the Commission was, in other words, directed to issue the station license unless the permittee had failed to construct in conformity with its application or permit or unless, as here, causes or circumstances coming to the attention of the Commission for the first time since the grant of the permit demonstrated that operation of the station would not be in the public interest. Contrary to petitioner's claim, there is absolutely no question involved here of permittees applying for station licenses being considered (Pet. 19) "as new applicants without any procedural rights."

CONCLUSION

The decision below is correct and no question warranting review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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